

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

EUGENIO PÉREZ PÉREZ,

Petitioner

V.

UNITED STATES OF AMERICA,

## Respondent

CIVIL 05-2233 (PG)  
(CRIMINAL 01-0614 (PG))

## MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

## I. INTRODUCTION

This matter is before the court on motion filed by the petitioner, Eugenio Pérez-Pérez (“hereinafter petitioner”), pro se, to vacate, set aside or correct sentence under 28 U.S.C. § 2255, filed on November 28, 2005. (Docket No. 1.) On January 23, 2006, a motion for summary judgement was filed by petitioner (Docket No. 6) and denied on January 25, 2006. (Docket No. 7.) The court then granted the United States twenty days to answer the motion to vacate. (*Id.*) The United States responded to the petition on February 16, 2006. (Docket No. 8.) Petitioner replied to the response on March 23, 2006. (Docket No. 13.) Also on March 23, 2006 petitioner requested an evidentiary hearing on the motion to vacate. (Docket No. 14.) The petitioner challenges his sentence on six grounds: the first is that the petitioner’s defense counsel gave ineffective assistance during the pre-trial stage, trial stage, and post-trial stage of the proceedings, all of which fell below the minimum standards of Strickland v. Washington, 466 U.S. 668 (1984). The second

CIVIL 05-2233 (PG)  
(CRIMINAL 01-0614 (PG))

2

is that the petitioner's section 924(c) sentence must be vacated based upon the decision of United States v. Booker, 543 U.S. 220 (2005), extending the doctrine to judicial fact-determination under 18 U.S.C. § 924(c) (firearm provisions) and its accompanying United States sentencing guideline provision. The third is that the section 924(c) sentence must be vacated since the government did not specify what type of firearm petitioner was claimed to have used or carried during and in relation to the drug conspiracy offense. The fourth is that petitioner's section 924(c)(1)(A)(i) sentence must be vacated since the government did not provide a factual foundation for a guilty plea where the petitioner pleaded guilty to providing "armed escort" to drug conspirators under count five of the indictment, thus failing to comply with Rule 11(c)(1) constitutional requirements. The fifth is that the petitioner's fifth and sixth amendments rights were violated since petitioner's sentence was enhanced based on facts that were not charged in the indictment, thus warranting a vacatur or sentence reduction in light of Booker. The sixth is that the government's use of unavailable cooperating witnesses and of co-conspirators' testimony at the sentencing phase requires that the sentence be vacated in light of Crawford v. Washington, 541 U.S. 36 (2004).

Respondent United States of America opposes the motion to vacate on the grounds that petitioner's claims are devoid of merit, that he seeks retroactive application of the holding in Booker, and that at the time of sentencing and on

1 CIVIL 05-2233 (PG)  
2 (CRIMINAL 01-0614 (PG))

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

appeal, petitioner acknowledges possessing and carrying of a firearm. Consequently his present claims lack merit.

## II. BACKGROUND

On November 21, 2001, a Grand Jury returned a sealed six-count superceding indictment charging Eugenio Pérez-Pérez along with seven other co-defendants, in Criminal 01-0614 (PG). Count one charged that from on or about January 29, 2001, through on or about April 21, 2001, Pérez-Pérez and the seven co-defendants conspired with each other to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a) (1), 846. Count five charged that from on or about February 4, 2001 to on or about March 12, 2001, Pérez-Pérez and seven co-defendants, aiding and abetting one another and in furtherance of the conspiracy alleged in count one, did carry firearm(s) during and in relation to a drug trafficking crime, to wit: conspiracy and attempt to distribute cocaine, in violation of 21 U.S.C. § 846; all in violation of 18 U.S.C. § 924(c)(1)(A)(i). A jury trial was held on March 5, 6, 8, 11, and 12, 2002. On the sixth day of trial, March 14, 2002, Pérez-Pérez and two other co-defendants informed the district court of plea negotiations. Pérez-Pérez pleaded guilty as to counts one and five of the Second Superseding Indictment.

On August 26, 2002, Pérez-Pérez was sentenced to: (1) seventy-eight months of imprisonment as to count one and sixty months of imprisonment as to count five, the terms to be served consecutively with each other; and 2) a supervised release

CIVIL 05-2233 (PG)  
(CRIMINAL 01-0614 (PG))

4

term of four years as to count one and three years as to count five, to be served concurrently with each other. The conviction was affirmed on appeal. United States v. Pérez-Pérez, No. 02-2185 (1<sup>st</sup> Cir. Aug. 31, 2004) (unpublished). On November 29, 2004 the Supreme Court of the United States entered the order denying the petition for a Writ of Certiorari. Pérez Pérez v. United States, 543 U.S. 1011 (2004).

### III. DISCUSSION

Under section 28 U.S.C. § 2255, a federal prisoner may move for post conviction relief if:

the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . .

28 U.S.C. § 2255; Hill v. United States, 368 U.S. 424, 426-27 (1962); David v. United States, 134 F.3d 470, 474 (1<sup>st</sup> Cir. 1998). The burden is on the petitioner to show his entitlement to relief under section 2255, David v. United States, 134 F.3d at 474, including his entitlement to an evidentiary hearing. Cody v. United States, 249 F.3d 47, 54 (1<sup>st</sup> Cir. 2001) (quoting United States v. McGill, 11 F.3d 223, 225 (1<sup>st</sup> Cir. 1993)). It has been held that an evidentiary hearing is not necessary if the 2255 motion is inadequate on its face or if, even though facially adequate, “is conclusively refuted as to alleged facts by the files and records of the case.” United States v. McGill, 11 F.3d at 226 (quoting Moran v. Hogan, 494 F.2d 1220, 1222 (1<sup>st</sup> Cir. 1974)). In other words, a section 2255 motion may be denied without a hearing as

1 CIVIL 05-2233 (PG)  
2 (CRIMINAL 01-0614 (PG))

5

3 to those allegations which, if accepted as true, entitle the movant to no relief, or  
4 which need not be accepted as true because they state conclusions instead of facts,  
5 contradict the record, or are “inherently incredible.” United States v. McGill, 11  
6 F.3d at 226 (citations omitted).

8                   A. Ineffective Assistance of Counsel

9                 As stated above, a prisoner in custody under federal sentence may move under  
10 section 2255 to vacate, set aside or correct a sentence imposed in violation of the  
11 Constitution of the United States. Daniels v. United States, 532 U.S. 374, 377  
12 (2001). A claim of ineffective assistance of counsel is one such constitutional  
13 violation that may be raised by way of a 2255 motion. See United States v. Kayne,  
14 90 F.3d 7, 14 (1<sup>st</sup> Cir. 1996). To be successful in an ineffective assistance of counsel  
15 challenge, a petitioner must allege that the deficiencies in the performance of trial  
16 counsel assumed unconstitutional dimensions. Barret v. United States, 965 F.2d  
17 1184, 1193 (1<sup>st</sup> Cir. 1992). “The benchmark for judging any claim of ineffectiveness  
18 must be whether counsel’s conduct so undermined the proper functioning of the  
19 adversarial process that the trial cannot be relied on as having produced a just  
20 result.” Strickland v. Washington, 466 U.S. at 686.

21                 The Constitution’s Sixth Amendment guarantees criminal defendants the right  
22 to effective assistance of counsel; but this should not be construed as meaning that  
23 defendants are guaranteed “a letter-perfect defense or a successful defense . . .”  
24 Lema v. United States, 987 F.2d 48, 51 (1<sup>st</sup> Cir. 1993) (quoting United States v.  
25

1 CIVIL 05-2233 (PG)  
2 (CRIMINAL 01-0614 (PG))

6

3 Natanel, 938 F.2d 302, 309-10 (1<sup>st</sup> Cir. 1991)). “[N]ot every lawyerly slip  
4 constitutes ineffective assistance of counsel for Sixth Amendment purposes.” Prou  
5 v. United States, 199 F.3d 37, 48 (1<sup>st</sup> Cir. 1999). The familiar two-part test for  
6 constitutionally ineffective assistance of counsel was set forth in Strickland v.  
7 Washington, 466 U.S. at 687; see also Smullen v. United States, 94 F.3d 20, 23 (1<sup>st</sup>  
8 Cir. 1996); Knight v. United States, 37 F.3d 769, 774 (1<sup>st</sup> Cir. 1994). Under the  
9 Strickland test, petitioner Pérez-Pérez has the burden of showing that “(a) . . .  
10 counsel’s performance fell below an objective standard of reasonableness, and (2)  
11 there is a reasonable probability that, but for counsel’s unprofessional error, the  
12 result of the proceedings would have been different.” López-Nieves v. United States,  
13 917 F.2d 645, 648 (1<sup>st</sup> Cir. 1990) (citing Strickland v. Washington, 466 U.S. at 669);  
14 see Argencourt v. United States, 78 F.3d 14, 16 (1<sup>st</sup> Cir. 1996); Scarpa v. Dubois, 38  
15 F.3d 1, 8 (1<sup>st</sup> Cir. 1994); Lema v. United States, 987 F.2d at 51. There is no doubt  
16 that Strickland also applies to representation outside of the trial setting, which  
17 would include sentence and appeal. See Hill v. Lockhart, 474 U.S. 52, 57 (1985);  
18 Bonneau v. United States, 961 F.2d 17, 20-22 (1<sup>st</sup> Cir. 1992); United States v.  
19 Tajeddini, 945 F.2d 458, 468-69 (1<sup>st</sup> Cir. 1991), abrogated on other grounds by Roe  
20 v. Flores-Ortega, 528 U.S. 470 (2000); cf. Panzardi-Álvarez v. United States, 879  
21 F.2d 975, 982 (1<sup>st</sup> Cir. 1989); López-Torres v. United States, 876 F.2d 4, 5 (1<sup>st</sup> Cir.  
22 1989), abrogated on other grounds by Bonneau v. United States, 961 F.2d 17 (1<sup>st</sup>  
23 Cir. 1992).  
24  
25  
26  
27  
28

1 CIVIL 05-2233 (PG)  
2 (CRIMINAL 01-0614 (PG))

7

3 In order to satisfy the first-prong of the aforementioned test, petitioner “must  
4 show that ‘in light of all the circumstances, the identified acts or omissions  
5 [allegedly made by his trial attorney] were outside the wide range of professionally  
6 competent assistance.’” Tejeda v. Dubois, 142 F.3d 18, 22 (1<sup>st</sup> Cir. 1998) (quoting  
7 Strickland v. Washington, 466 U.S. at 690). He must overcome the “strong  
8 presumption that counsel’s conduct falls within the wide range of reasonable  
9 professional assistance.” Smullen v. United States, 94 F.3d at 23 (quoting  
10 Strickland v. Washington, 466 U.S. at 689). Finally, a court must review counsel’s  
11 actions deferentially, and should make every effort “to eliminate the distorting  
12 effects of hindsight.” Argencourt v. United States, 78 F.3d at 16 (quoting Strickland  
13 v. Washington, 466 U.S. at 689); see also Burger v. Kemp, 483 U.S. 776, 789 (1987).

14  
15  
16  
17 The second prong of the test, “[t]he ‘prejudice’ element of an ineffective  
18 assistance [of counsel] claim[,] also presents a high hurdle. ‘An error by counsel,  
19 even if professionally unreasonable, does not warrant setting aside the judgment of  
20 a criminal proceeding if the error had no effect on the judgment.’” Argencourt v.  
21 United States, 78 F.3d at 16 (quoting Strickland v. Washington, 466 U.S. at 691).  
22 Thus, petitioner must affirmatively “prove that there is a reasonable probability that,  
23 but for [his] counsel’s errors, the result of the proceeding would have been  
24 different.” Knight v. United States, 37 F.3d at 774 (citing Strickland v. Washington,  
25 466 U.S. at 687). Finally, the use of collateral review of sentencing issues is very  
26  
27  
28

1 CIVIL 05-2233 (PG)  
2 (CRIMINAL 01-0614 (PG))

8

3 limited and is not appropriate in this case. See Cirilo-Muñoz v. United States, 404  
4 F.3d 527, 532 (1<sup>st</sup> Cir. 2005).

5 Petitioner here adds a variation to the theme of his appeal, focusing it on the  
6 poor performance of his attorney, as poor certainly as that of the other attorneys  
7 who conducted plea negotiations and reaped the benefits of a sentence that was  
8 definitely lower than one they could have expected had they continued within the  
9 trial process. All convictions were appealed. Veritably all convictions were affirmed.  
10  
11 This rehash of appellate argument bears no fruit, unlike his counseled plea  
12 agreement.

14 Numerous motions for the discovery and suppression of evidence were made  
15 in Criminal No. 01-0614 (PG), Docket Nos. 77, 82, 111, 112, 146, and 169.  
16 Counsel was advised of the availability of government evidence. (See Docket No. 8,  
17 Exhibit Letter Documents 8-2 and 8-3.) Petitioner alleges that his counsel failed to  
18 provide effective assistance when he advised him to enter a guilty plea, argument  
19 that is contradicted. The record reflects that petitioner voluntarily entered a plea  
20 of guilty. “It is well-settled that a voluntary and intelligent plea of guilty made by  
21 an accused person, who has been advised by competent counsel, may not be  
22 collaterally attacked.” Bousley v. United States, 523 U.S. 614, 621 (1998) (quoting  
23 Mabry v. Johnson, 467 U.S. 504, 508 (1984)); see also United States v. Broce, 488  
24 U.S. 563, 569 (1989) (“[W]hen the judgment of conviction upon a guilty plea has  
25 become final and the offender seeks to reopen the proceeding, the inquiry is  
26  
27  
28

1 CIVIL 05-2233 (PG)  
 2 (CRIMINAL 01-0614 (PG))

9

3 ordinarily confined to whether the underlying plea was both counseled and  
 4 voluntary. If the answer is in the affirmative then the conviction and the plea, as  
 5 a general rule, foreclose the collateral attack.”).

7 That principle controls here. Petitioner alleges actual innocence, an allegation  
 8 clearly belied by the record and the appellate judgment of August 31, 2004.  
 9 Petitioner makes his guilty plea seem like he was rushed to judgment by his  
 10 attorney. He and the other police officers/prisons guards/drug escorts charged in  
 11 this indictment entered guilty pleas after five days of trial which included a Carbone  
 12 hearing.<sup>1</sup> The record conclusively proves him wrong.

14 The guilty plea serves as a stipulation that no proof by the prosecution is  
 15 further needed, since it supplies both evidence and verdict, thus ending the  
 16 controversy. Boykin v. Alabama, 395 U.S. 238, 242 n.4 (1969) (citation omitted).  
 17 The “plea of guilty [entered by petitioner] and the ensuing conviction [constitute]  
 18 all of the factual and legal elements necessary to sustain a binding, final judgment  
 19 of guilt and a lawful sentence.” United States v. Broce, 488 U.S. at 569.

21 Petitioner had the opportunity, instead of entering a guilty plea, to challenge  
 22 the facts or elements of the weapons offense in the indictment. He chose not, hence  
 23 relinquishing that entitlement. Not only he but his seven cohorts relinquished the  
 24 same entitlement.

---

27 <sup>1</sup>Six defendants entered guilty pleas on March 14 and the remaining two on  
 28 the following day. Sentences in count one ranged from 63 to 188 months. The most  
 common sentence was 78 months; the average was 105.

CIVIL 05-2233 (PG)  
(CRIMINAL 01-0614 (PG))

10

The district court spelled out the indictment in its entirety at least twice, at trial and at sentence, and petitioner admitted possession of the weapon, through his attorney, at the time of sentence. During the pre-sentence investigation the defendant admitted carrying a government issue firearm during his participation in the offenses and recognized that the possession of the firearm was a separate crime and accepted responsibility for it. (Docket No. 232, Pre-sentence Investigation Report, at 8, ¶ 29.) Furthermore at sentencing, petitioner acknowledged that no corrections needed to be made to the pre-sentence report. (Docket No. 293, Sentencing Hearing, Tr. at 4.)

A valid guilty plea, serves as an admission of all elements of a formal criminal charge, and admits even those allegations which form the factual predicate for federal jurisdiction. Valencia v. United States, 923 F.2d 917, 921 (1<sup>st</sup> Cir. 1991). During trial petitioner in fact entered a valid guilty plea and never challenged the same. Furthermore, that counsel advised him to plead guilty was effective due to the fact if a plea agreement would not have been reach and the government had not reduced the amount of drugs charged to the defendant he would have served a much longer sentence. (Docket No. 293, Sentencing Hearing, Tr. at 7-8.) In short, there is no basis for finding a Sixth Amendment violation.

## B. 18 U.S.C. § 924 Firearms

Petitioner alleges that the indictment failed to detail the type of firearm possessed and carried in the instance case. Such identification is not an essential

CIVIL 05-2233 (PG)  
(CRIMINAL 01-0614 (PG))

11

element of the offense. He requests retroactive application of United States v. Booker, 543 U.S. 220 (2005). Allegations in an indictment that are not necessary to establish a violation of the statute at issue are mere surplusage and may be disregarded if the remaining allegations are sufficient to charge a crime. United States v. Washington, 992 F.2d 785, 787 (8<sup>th</sup> Cir. 1993). The specific type of firearm used or carried by a defendant is not an essential element of the crime and is therefore surplusage. United States v. Robinson, 904 F.2d 365, 369 (6<sup>th</sup> Cir. 1990). In this case petitioner failed to dispute facts contained in the pre-sentence investigation, which operates as an admission of those facts for Booker purposes. Therefore the defendant is not a candidate to benefit from Booker error.<sup>2</sup> In addition Booker does not apply when convictions are attacked collaterally. Lloyd v. United States, 407 F.3d 608, 611 (3<sup>rd</sup> Cir.), cert. denied, 126 S. Ct. 288 (2005); Guzmán v. United States, 404 F.3d 139, 140 (2<sup>nd</sup> Cir.), cert. denied, 126 S. Ct. 731 (2005).

### C. Sentencing

During the sentencing phase, the government's intervention was limited to identification of the record, and dismissal of the remaining counts of the indictment. The government did not have any further statements to be made. In addition there

<sup>2</sup>On the petition for a writ of certiorari, the Acting Solicitor General had argued that the defendant had argued that his sentence was imposed in violation of Blakely, and further suggested that the petition for a writ of certiorari be held pending the Court's decision in Booker and Fanfan. The Court denied certiorari in 2004 and Booker was announced in 2005.

1 CIVIL 05-2233 (PG)  
2 (CRIMINAL 01-0614 (PG))

12

3 was a fixed term of imprisonment of five years imposed by the court according to 18  
4 U.S.C. § 924(c)(1)(A)(i). There was no enhancement imposed on the weapon's  
5 charge. In this case the court articulated the reasoning of the sentence and specified  
6 the reasons for selecting the sentence. (Docket No. 293, Sentencing Hearing, Tr.  
7 at 8-9.) "A sentencing judge must explain the reason for imposing a particular  
8 sentence." United States v. Torres, 251 F.3d 138, 145 (3<sup>rd</sup> Cir. 2001). The court did  
9 exactly that and also made clear that the sentence would have been higher but for  
10 the agreement as to drug quantity reached as a result of the verbal plea agreement.

13 IV. CONCLUSION

14 Petitioner has failed to establish that his attorney was deficient in that the  
15 quality of his representation fell below an objective standard of reasonableness.  
16 Strickland v. Washington, 466 U.S. at 686-87; United States v. Downs-Moses, 329  
17 F.3d 253, 265 (1<sup>st</sup> Cir. 2003). But even assuming that petitioner were to have  
18 succeeded in showing deficiencies in his legal representation, then he must have  
19 conclusively established that said deficiencies operated a real prejudice against him  
20 in the criminal proceedings. To demonstrate such prejudice, the petitioner must  
21 have shown that there is a reasonable probability that, but for counsel's  
22 unprofessional errors, the result of the proceeding would have been different. The  
23 Strickland standard was clearly not transgressed by counsel's performance,  
24 particularly if one regards how many defendants were either acquitted or received  
25 lenient sentences. Finally, collateral review of issues or claims which were already  
26  
27  
28

1 CIVIL 05-2233 (PG)  
2 (CRIMINAL 01-0614 (PG))

13

3 presented to and addressed by the court of appeals is barred, since section 2255  
4 motion is “neither a recapitulation of nor a substitute for a direct appeal.” McCleese  
5 v. United States, 75 F.3d 1174, 1177 (7<sup>th</sup> Cir. 1996) (quoting Bedford v. United  
6 States, 975 F.2d 310, 313 (7<sup>th</sup> Cir. 1992)). Much of petitioner’s argument was  
7 addressed or could have been addressed on direct appeal. Indeed, the seminal issue  
8 of the lack of evidence of carrying a firearm, and the argument of actual innocence  
9 was addressed by the court of appeals. The court noted that Pérez-Pérez carried his  
10 service weapon during the transport and was well-trained to use it if necessary to  
11 defend the shipment.

14 Accordingly, it is my recommendation that the section 2255 motion be  
15 dismissed in its entirety without an evidentiary hearing.  
16

17 Under the provisions of Rule 72 (d), Local Rules, District of Puerto Rico, any  
18 party who objects to this report and recommendation must file a written objection  
19 there to with the Clerk of this Court within ten (10) days of the party’s receipt of  
20 this report and recommendation. The written objections must specifically identify  
21 the portion of the recommendation, or report to which objection is made and the  
22 basis for such objections. Failure to comply with this rule precludes further  
23 appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet v.  
24 Maccorone, 973 F.2d 22, 30-31 (1<sup>st</sup> Cir. 1992); Paterson-Leitch Co. v. Mass. Mun.  
25 Wholesale Elec. Co., 840 F.2d 985 (1<sup>st</sup> Cir. 1988); Borden v. Sec’y of Health &  
26 Human Servs., 836 F.2d 4, 6 (1<sup>st</sup> Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14 (1<sup>st</sup>  
27  
28

1 CIVIL 05-2233 (PG)  
2 (CRIMINAL 01-0614 (PG))

14

3 Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1<sup>st</sup> Cir. 1982); Park Motor  
4  
Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1<sup>st</sup> Cir. 1980).

5 At San Juan, Puerto Rico, this 12<sup>th</sup> day of January, 2007.

6  
7  
8 S/ JUSTO ARENAS  
9 Chief United States Magistrate Judge  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28